Chong Swee Huat & Anor v Lim Shian Ghee (t/a L & G Consultants & Education Services

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–385 OF 2006
JAMES FOONG, ZAINUN ALI AND VINCENT NG JJCA
11 FEBRUARY 2009

Tort — Damages — Defamation — Libel — Assessment — General, aggravated and special damages — Whether special damages proved — Whether award of aggravated damages proper when defendants had expressly apologised within period requested by plaintiff

Tort — Defamation — Libel — Appeal — Publication of letter by defendants on conduct of plaintiff — Whether bore defamatory words — Whether complaints and insinuations referred to plaintiff — Whether a reasonable reader would believe and understand letter to be defamatory of plaintiff — Whether defendants' plea of justification established — Whether defendants actuated by malice

The plaintiff/respondent was, at the material time, the sole representative in the State of Johore of two institutions of higher learning: (a) St Clements University of Turks & Caicos, British West Indies and (b) Irish Business School of Dublin, Ireland. The plaintiff was actively promoting degree courses offered by these two institutions to students of the second defendant/appellant who had a large reservoir of potential candidates largely studying for a diploma or a certificate programme. Certain degree qualifications from the above two institutions was accepted by the Malaysian Association of the Institute of Chartered Secretaries and Administrators ('MAICSA') and the Association of International Accountants ('AIA'). The Jabatan Perkhidmatan Awam ('JPA') also accorded recognition, on condition that the holder of such a degree had already gained a first degree from another university which JPA recognised. Sometime in 1999, the National Accreditation Board ('LAN') issued a circular, a copy of which was sent to the second defendant, stating that the validity, existence and quality of three foreign institutions of higher learning were in doubt and LAN would not process academic certificates issued by them. The three were: (a) St George University International (established in the Turks & Caicos Islands); (b) European University Ireland; and (c) The Irish School of Economics & Management. The second defendant juxtaposed at the bottom of the circular 'NOTE: Confirmed with British Council (UK): (1) St Clement University is

under Irish Business School; (2) No information about St George University; (3) The 3 Universities listed above are NOT in UK'. The above circular with its added note was displayed by the second defendant on its notice board ('exh P20'). Subsequently, the first defendant, a principal of the second defendant, issued a circular to all the students and staff of the second defendant ('exh P23'). According to the plaintiff, by the natural and ordinary meaning of the words juxtaposed and expressed in P20 and P23 meant and were understood to mean, inter alia, that the plaintiff for his personal gain had misled the students concerned by promoting degree courses in St Clements University and Irish Business School whose validity, existence and quality was doubted by LAN and therefore the plaintiff was a dishonest and unscrupulous man; that the plaintiff was a cheat and unfit to be engaged in the business of education; and that the plaintiff by promoting degree courses in the above two institutions had committed an offence under the National Council on Higher Education Act 1996 which was punishable by a fine of RM100,000 and imprisonment of one year. As a result of the impugned words, the plaintiff claimed that he had suffered serious injury to his reputation and business. For this, he demanded general and special damages. The High Court found that the impugned words were defamatory and thus awarded damages. Hence this appeal by the defendants. The defendants' primary ground of appeal was that the learned trial judge erred in rejecting the appellants' defence of justification in publishing the defamatory words and the High Court had failed to appreciate this. Further, the High Court awarded aggravated damages without proof of any malice; and special damages was awarded based purely on speculative loss of profits.

Held, dismissing the appeal with costs:

(1) (per **James Foong JCA** and **Vincent Ng JCA**) From the facts, it was apparent that the defendants did not directly challenge the plaintiff as to the natural and ordinary meaning of the words as pleaded by him. Apart from a general denial, the defendants did not specifically contradict the meaning of the impugned words as pleaded by the plaintiff. However, in their defence of justification, the defendants assigned to the impugned words another meaning which was contrary to the plaintiff's pleaded case and then based on their meaning of the impugned words, gave reasons to justify it, which should not be allowed (see paras 15–16).

(2) (per **James Foong JCA**) Further, the organisation that doubted the existence, validity and quality of the two institutions which the plaintiff represented was LAN, not the British Council in Malaysia or the Ministry of Higher Learning. So to include British Council and the said Ministry for consideration was incorrect and was not the pleaded

A meaning of the plaintiff. Further, the defendants had failed to adduce convincing evidence to support the contention that LAN had doubted the existence, validity and academic quality of St Clements University and Irish Business School (see para 22).

B (3) (per **James Foong JCA** and **Vincent Ng JCA**) There was no evidence advanced by the defendants to prove that the plaintiff had cheated anyone. No witness had come forward to say that the plaintiff had cheated him either by offering him a forged degree from the two institutions, or refusing to grant him a degree after having enrolled and
C completed a course or exercise conducted by these two institutions, or the degree so awarded by them was not recognised by the bodies or organisations claimed by the plaintiff. Further, the degrees for the two institutions were accepted by MAICSA, AIA and even JPA except that the latter had a rider to say that any person holding such degrees must
D in addition also possess a first degree that was recognised by them (see paras 25–30).

(4) (per **James Foong JCA**) The very fact that no criminal charges were preferred against the plaintiff till to date implied that the plaintiff had
E committed no such offence. In the circumstances there was no justification for the defendants to publish the impugned words (see para 33).

(5) (per **Zainun Ali JCA** dissenting) The note in P20 stated that it was confirmed by British Council that St Clements University was under
F the Irish Business School and there was no explicit allegation of adverse remark or comment about either the plaintiff or the two institutions. By itself, the note in P20 was in fact bland and there was no suggestion or insinuation that the two institutions were in doubt. The note in fact,
G was quite cryptic (see para 95).

(6) (per **Zainun Ali JCA** dissenting) Where the criticism related solely to the plaintiff's product and not to the plaintiff it would not be defamatory. In this connection the note in P20 and the contents of P23
H related not to the plaintiff but to the two institutions which he promoted (see para 105).

(7) (per **Zainun Ali JCA** dissenting) In the face of the withdrawal of the impugned words and apology by the defendant, the demand for further apologies and the sum of RM980,000 by the plaintiff were unjustified
I and could ironically be said to be actuated by malice. What was crucial was at the time of his comments, he honestly believed it to be true. The plaintiff in this connection failed to establish that the defendant was actuated by malice when he made the said comment. In the circumstances, the learned trial judge had erred in awarding the plaintiff

the sum of RM980,000 as special damages, when the plaintiff had led no evidence on special damages (see paras 216, 221 & 235).

[Bahasa Malaysia summary

Plaintif merupakan, pada masa matan, satu-satunya wakil dua institusi pengajian tinggi di negeri Johor: (a) St Clements University of Turks & Caicos, British West Indies; dan (b) Irish Business School of Dublin, Ireland. Plaintif giat mempromosikan kursus-kursus ijazah sarjana yang ditawarkan oleh kedua-dua institusi tersebut kepada pelajar-pelajar defendan kedua yang mempunyai ramai calon yang berpotensi kebanyakannya sedang belajar untuk program diploma atau sijil. Kelayakan ijazah sarjana tertentu daripada kedua-dua institusi di atas diterima oleh Malaysian Association of the Institute of Chartered Secretaries and Administrators ('MAICSA') and the Association of International Accountants ('AIA'). Jabatan Perkhidmatan Awam ('JPA') juga telah memberikan pengiktirafan, dengan syarat bahawa pemegang ijazah sarjana tersebut telah memperoleh ijazah sarjana yang pertama daripada universiti lain yang diperakui oleh JPA. Sekitar tahun 1999, Lembaga Akreditasi Negara ('LAN') telah mengeluarkan pekeliling, yang sesalinannya telah dihantar kepada defendan kedua, menyatakan bahawa kesahan, kewujudan dan kualiti tiga institusi pengajian tinggi luar negara diragui dan LAN tidak akan memproses sijil-sijil akademik yang dikeluarkan oleh institusi-institusi tersebut. Institusi-institusi tersebut adalah: (a) St George University International (ditubuhkan di Turks & Caicos Islands); (b) European University Ireland; dan (c) Irish School of Economics & Management. Defendan kedua telah menyatakan di bahagian bawah pekeliling 'NOTE: Confirmed with British Council (UK): (1) St Clement University is under Irish Business School; (2) No information about St George University; (3) The 3 Universities listed above are NOT in UK'. Pekeliling di atas dengan nota tambahannya telah dipamerkan oleh defendan kedua pada papan notisnya ('eksh P20'). Seterusnya, defendan pertama, pengetua defendan kedua, telah mengeluarkan pekeliling kepada semua pelajar dan kakitangan defendan kedua ('eksh P23'). Menurut plaintif, berdasarkan maksud asal dan biasa perkataan-perkataan yang diatur dan dinyatakan dalam P20 dan P23 bermaksud dan difahami untuk bermakna, antara lain, bahawa plaintif untuk keuntungan peribadinya telah memperdaya pelajar-pelajar yang berkenaan dengan mempromosikan kursus-kursus ijazah sarjana di St Clements University and Irish Business School yang mana kesahan, kewujudan dan kualitinya diragui oleh LAN dan oleh itu plaintif merupakan seorang yang tidak jujur dan tidak berprinsip; bahawa plaintif seorang penipu dan tidak layak melibatkan diri dalam perniagaan pelajaran; dan bahawa plaintif dengan mempromosikan kursus-kursus ijazah sarjana di kedua-dua institusi di atas telah melakukan kesalahan di bawah Akta Majlis Pendidikan Tinggi Negara 1996 yang boleh

A dihukum denda sejumlah RM100,000 dan penjara selama setahun. Akibat perkataan-perkataan yang dipersoalkan, plaintif mendakwa bahawa reputasi dan perniagaannya terjejas teruk. Oleh yang demikian, dia menuntut ganti rugi am dan ganti rugi khas. Mahkamah Tinggi mendapati bahawa perkataan-perkataan yang dipersoalkan itu berunsur fitnah dan dengan itu
B mengawardkan ganti rugi tersebut. Maka rayuan ini oleh defendan. Alasan utama rayuan defendan adalah bahawa hakim perbicaraan yang bijaksana telah terkhilaf dalam menolak pembelaan perayu untuk menjustifikasikan penerbitan perkataan-perkataan berunsur fitnah tersebut dan Mahkamah Tinggi telah gagal untuk menyedari perkara ini. Selanjutnya, Mahkamah
C Tinggi telah mengawardkan ganti rugi tanpa bukti sebarang niat buruk; dan ganti rugi khas telah diawardkan semata-mata berdasarkan spekulasi tentang kerugian keuntungan.

D **Diputuskan**, menolak rayuan dengan kos:

(1) (oleh **James Foong HMR** dan **Vincent Ng HMR**) Berdasarkan fakta, adalah jelas bahawa defendan tidak mencabar plaintif secara langsung tentang maksud asal dan biasa perkataan-perkataan yang diplid
E olehnya. Selain daripada penafian umum, defendan tidak secara khusus menyangkal maksud perkataan-perkataan yang dipersoalkan seperti yang diplidkan oleh plaintif. Walau bagaimanapun, dalam pembelaan justifikasinya, defendan telah memberikan perkataan-perkataan yang dipersoalkan tersebut maksud lain yang bertentangan dengan kes yang
F diplid oleh plaintif dan kemudian berdasarkan maksud perkataan-perkataan yang dipersoalkan tersebut, telah memberikan alasan untuk menjustifikasikannya, yang tidak sepatutnya dibenarkan (lihat perenggan 15–16).

G (2) (oleh **James Foong HMR**) Selanjutnya, organisasi tersebut telah meragui kewujudan, kesahan dan kualiti dua institusi itu yang mana plaintif wakili untuk LAN, dan bukan British Council di Malaysia atau Kementerian Pendidikan Tinggi. Oleh itu untuk menerima British Council dan Kementerian tersebut untuk dipertimbangkan adalah
H tidak salah dan bukan maksud yang diplidkan oleh plaintif. Tambahan, defendan telah gagal untuk mengemukakan keterangan yang meyakinkan untuk menyokong pendapat bahawa LAN telah meragui kewujudan, kesahan dan kualiti akademik St Clements University dan Irish Business School (lihat perenggan 22).

I (3) (oleh **James Foong HMR** dan **Vincent Ng HMR**) Tiada keterangan yang telah dikemukakan oleh defendan untuk membuktikan bahawa plaintif telah menipu sesiapa. Tiada saksi telah ke hadapan untuk menyatakan bahawa plaintif telah menipunya sama ada dengan menawarkannya ijazah sarjana palsu daripada dua institusi tersebut,

atau enggan memberikannya ijazah sarjana setelah memasuki dan menamatkan kursus atau latihan yang dikendalikan oleh dua institusi tersebut, atau ijazah sarjana yang diawardkan oleh institusi-institusi tersebut tidak dikenali oleh badan atau organisasi yang didakwa oleh plaintif. Selanjutnya, ijazah sarjana untuk dua institusi tersebut diterima oleh MAICSA, AIA dan juga JPA kecuali JPA mempunyai kenyataan tambahan yang menyatakan bahawa sesiapa yang memegang ijazah sarjana tersebut hendaklah sebagai tambahan juga memiliki ijazah sarjana pertama yang diperakui olehnya (lihat perenggan 25–30).

(4) (oleh **James Foong HMR**) Hakikat bahawa tiada pertuduhan jenayah dibuat terhadap plaintif sehingga kini menunjukkan bahawa plaintif tidak melakukan kesalahan sedemikian. Dalam keadaan berikut tiada justifikasi untuk defendan menerbitkan perkataan-perkataan yang dipersoalkan itu (lihat perenggan 33).

(5) (oleh **Zainun Ali HMR** menentang) Nota dalam P20 menyatakan bahawa British Council telah mengesahkan bahawa St Clements University adalah di bawah Irish Business School dan tiada dakwaan eksplisit tentang kenyataan atau komen buruk tentang plaintif ataupun kedua-dua institusi tersebut. Dengan sendirinya, nota dalam P20 pada hakikatnya adalah bersahaja dan tidak mencadangkan atau membuat sindiran bahawa dua institusi tersebut diragui. Nota itu sebenarnya, mempunyai maksud tersembunyi (lihat perenggan 95).

(6) (oleh **Zainun Ali HMR** menentang) Di mana kritikan berkaitan produk plaintif semata-mata dan bukan kepada plaintif, ia bukan berunsur fitnah. Sehubungan itu nota dalam P20 dan kandungan P23 bukan berkaitan plaintif tetapi kepada dua institusi yang dipromosikan olehnya (lihat perenggan 105).

(7) (oleh **Zainun Ali HMR** menentang) Berdasarkan penarikan balik perkataan-perkataan yang dipersoalkan dan defendan yang telah meminta maaf, tuntutan untuk permaafan selanjutnya dan jumlah RM980,000 oleh plaintif tidak dijustifikasikan dan boleh dikatakan telah didorong oleh niat jahat. Apa yang penting adalah pada masa dia membuat komen, dia secara jujur mempercayainya adalah benar. Plaintif di sini telah gagal membuktikan bahawa defendan didorong oleh niat jahat apabila dia membuat komen tersebut. Dalam keadaan berikut, hakim perbicaraan yang bijaksana terkhilaf dalam mengawardkan plaintif sejumlah RM980,000 sebagai ganti rugi khas, walhal plaintif tidak mengemukakan sebarang keterangan untuk ganti rugi khas (lihat perenggan 216, 22 & 235).]

Notes

For cases on defamation, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 168–195.

A For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66, FC (refd)
B *Brembridge v Latimer* (1864) 12 WR 878 (folld)
Chew Sew Khian @ Chew Hua Seng v Saniboey Mohd Ismail & Ors [2003] 5 MLJ 91, HC (refd)
Cohen v Daily Telegraph Ltd [1968] 1 WLR 916, CA (refd)
Drummond-Jackson v British Medical Association & Ors [1970] 1 WLR 688,
C CA (refd)
Dwek v Macmillan Publishers Ltd [2000] EMLR 284 (refd)
Edwards v Bell (1824) 1 Bing 403 (refd)
Hulton (E) & Co v Jones [1910] AC 20, HL (refd)
Institute of Commercial Management United Kingdom v New Straits Times Press
D *(Malaysia) Bhd* [1993] 1 MLJ 408, HC (refd)
Knupffer v London Express Newspapers Ltd [1944] AC 116, HL (refd)
Le Mercier's Fine Furnishings Pte Ltd v Italcomm (Malaysia) Sdn Bhd [1996] 3 CLJ 590, HC (refd)
London Artists Ltd v Littler [1969] 2 QB 375, CA (refd)
E *Morgan v Oldhams Press Ltd & Anor* [1971] 2 All ER 1156, HL (refd)
Rassam v Budge [1893] 1 QB 571, QBD (folld)
Riches & Ors v News Group Newspapers [1986] QB 256, CA (refd)
Sim v Stretch (1936) 52 TLR 669, HL (refd)
South Hetton Coal Co Ltd v North Eastern News Association Ltd [1894] 1 QB
F 133, CA (refd)
Tolley v JS Fry & Sons Ltd [1931] AC 333, HL (refd)
Truth (NZ) Ltd v Avery [1959] NZLR 274 (refd)
Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd Ors [1996] 1 MLJ 393, HC (refd)
G *Youssoupoff v MGM Pictures Ltd* (1934) 50 TLR 581, CA (refd)

Legislation referred to

Defamation Act 1957 s 8
Private Higher Educational Institution Act 1996 ss 3(2), 75

H *M Pathmanathan (T Gan with him) (Gan & Lim) for the appellant.*
Balvinder Singh Kenth (Edwin J Savariraj and C Kumareson with him) (Francis Pereira & Shan) for the respondent.

James Foong JCA (delivering majority judgment):

I

[1] This is an appeal by the defendants against a decision of the High Court which allowed the plaintiff's claim for defamation and awarded a sum of RM200,000 as general damages, RM50,000 as exemplary and aggravated

damages, and RM980,000 as special damages, all with interest thereon and costs to the plaintiff.

BACKGROUND

[2] The dispute between the parties started in this manner. The plaintiff was, at the material time, the sole representative in the State of Johore of two institutions of higher learning: (a) St Clements University of Turks & Caicos, British West Indies (St Clements University) and Irish Business School of Dublin, Ireland (Irish Business School). The plaintiff was actively promoting degree courses offered by these two institutions to students of the second defendant. The second defendant had a large reservoir of potential candidates because its students were mostly engaged in courses awarded with a diploma or a certificate. The appeal of a degree qualification from these two institutions represented by the plaintiff was the chance to qualify for acceptance into the Malaysian Association of the Institute of Chartered Secretaries & Administrators ('MAICSA') and the Association of International Accountants ('AIA'). Even the Jabatan Perkhimatan Awam ('JPA') recognises it provided the holder of such degree must possess a first degree from a university recognised by them.

[3] Sometime in 1999, the National Accreditation Board ('LAN') issued a circular dated 20 August 1999. A copy of this circular was sent to the second defendant. This circular says that the validity, existence and quality of three foreign institutions of higher learning are in doubt and LAN will not process academic certificates issued by them. The three were:

(a) St George University International (established in the Turks & Caicos Islands);

(b) European University Ireland; and

(c) The Irish School of Economics & Management.

[4] Though the two institutions which the plaintiff represented were not included in this LAN circular, the second defendant juxtaposed at the bottom of this circular as follows:

NOTE:

Confirmed with British Council (UK):

1. St Clement University is under Irish Business School
2. No information about St George University
3. The 3 Universities listed above are NOT in UK.

[5] This circular with its added note was displayed by the second defendant on its notice board. This document was marked as exh P20. For full effect of this, I reproduce P20 in its entirety (see attachment).

[6] Then on 21 April 2000, the first defendant, a principal of the second defendant, issued a circular to all the students and staff of the second defendant. This document was marked as exh P23 and I reproduced it here in its entirety (see attachment).

[7] According to the plaintiff, by the natural and ordinary meaning of the words juxtaposed into P20 and those expressed in P23 meant and were understood to mean:

- The National Accreditation Board doubts the existence, validity and quality of St Clements University and the Irish Business School.
- That the British Council has confirmed that St Clements University is part of Irish Business School and that the validity, existence and quality of the said two institutions are in doubt.
- That the plaintiff for his personal gain had misled the students concerned by promoting degree courses in St Clements University and Irish Business School whose validity existence and quality is doubted by the National Accreditation Board and therefore the plaintiff is a dishonest and unscrupulous man.
- The plaintiff is a cheat and unfit to be engaged in the business of education.
- That the plaintiff by promoting degree courses in St Clements University and Irish Business School had committed an offence under the said Akta Institusi Pendidikan Tinggi Swasta 1996 which is punishable by a fine of RM100,000 and imprisonment of 1 year.

[8] As a result of the impugned words, the plaintiff claimed that he has suffered serious injury to his reputation and business. For this, he demanded general and special damages.

FINDING OF THE HIGH COURT

[9] On the literal meaning of the impugned words stated in P20, the trial judge found them to be untrue based on the following:

DW4 (the first defendant) in his evidence admitted that item 1 of the said note that St Clements University is under Irish Business School was untrue and false. Item 2 is not relevant and so is item 3 as it was not an issue that these universities were not in UK proper... A

DW4 (the first defendant) also admitted that the LAN circular did not mention St Clements University or Irish Business School. B

As for those stated in P23, the trial judge found them to be false based on the following

DW4 (the first defendant) in cross-examination admitted that the contents of para 2 of his letter dated 21 April 2000 is untrue because LAN did not question the validity, existence and quality of St Clements University and Irish Business School. C

DW3 (the representative from LAN) from LAN also confirmed that these 2 universities are not mentioned in their circular and that the note on its circular was not put up by LAN which piece of evidence is indicative that LAN was not at all concerned with the 2 universities and did not have any doubt over their legality, existence and academic quality. D

[10] Having found the impugned words were defamatory the High Court proceeded to consider the defences raised by the defendants and came to a conclusion that they were not proven. E

PRINCIPAL GROUND OF APPEAL — JUSTIFICATION

[11] From the submission advanced by the defendants, the principal ground for this appeal is that the defendants were justified in publishing the defamatory words and the High Court has failed to appreciate this. F

[12] At this juncture, it is necessary to examine what the defendants attempted to justify. According to their pleaded defence for justification, the defendants did not rely on the meaning of the words as pleaded by the plaintiff. Instead, in para 10 of the defence they pleaded as follows: G

Selanjutnya Defendan-defendan bergantung kepada pembelaan justifikasi (defence of justification) kerana pada amnya (in substance) keesahan (legality), kewujudan (existence) dan kualiti akademik (academic quality) 'St Clement University, UK' dan 'Irish Business School Dublin' memang adalah diragui (in doubt) kerana adalah benar pada fakta (in fact) bahawa: H

(i) 'St Clement University, UK' dan 'Irish Business School Dublin' bukannya institusi yang telah didaftarkan dengan Kementerian Pendidikan Malaysia menurut Akta Institusi Pendidikan Tinggi Swasta 1996; I

(ii) 'St Clement University, UK' wujud sebagai sebuah syarikat di Turks & Caicos Island dan bukannya sebagai sebuah university yang bertauliah, manakala 'Irish Business School Dublin' adalah suatu nama perniagaan sahaja;

(iii) Kedua-dua 'St Clement University, UK' dan 'Irish Business School Dublin' tiada kampus dan pensyarah sepenuh masa (no full-time teaching staff);

(iv) 'St Clement University, UK' boleh mengeluarkan ijazah 'Irish Business School Dublin' walaupun tiada pensyarah atau pengajar yang mampu mengajar bahasa Melayu.

[13] Translated into English it reads:

Further the defendants relied on the defence of justification because in substance the legality, existence and academic quality of St Clements University UK and Irish Business School Dublin are in doubt because it is a fact that:

(a) St Clements University, UK and the Irish Business School Dublin are not institutions which are registered with the Ministry of Education, Malaysia according to the PHEI Act;

(b) St Clements University, UK existed as a company in the Turks & Caicos Island and not as a university that was commissioned whilst Irish Business School, Dublin is only a business name;

(c) that both St Clements University, UK and Irish Business School Dublin are without campus and have no full time teaching staff;

(d) St Clements University, UK can award a Bachelor degree in Malay Studies without a lecturer or with the ability to teach the Malay language.

[14] Prior to this, in answer to the plaintiff's inferences of the impugned words found in para 9 of the statement of claim, all that the defendants could manage was:

Defendan-defendan menafikan kandungan perenggan 9 dan 10 Pernyataan Tuntutan dan menyatakan bahawa tiada apa-apa-pernah dikatakan atau disiarkan oleh mereka yang merujuk kepada Plaintif, LIM SHIAN GHEE atau kepada L & G CONSULTANTS & EDUCATION SERVICES.

Translated: 'The defendants deny para 9 and 10 of the statement of claim and assert that no words were said by them or ever published by them in reference to the plaintiff, 'LIM SHIAN GHEE' or of 'L & G CONSULTANTS & EDUCATION SERVICES.

[15] From above, it is apparent that the defendants did not directly challenge the plaintiff as to the natural and ordinary meaning of the words as pleaded by him. Apart from a general denial to para 9 of the plaintiffs' statement of claim, the defendants did not specifically contradict the meaning of the impugned words as pleaded by the plaintiff. However, in their defence of justification, the defendants assigned to the impugned words another meaning which is contrary to the plaintiffs pleaded case, then based on their meaning of the impugned words gave reasons to justify it.

[16] In my opinion, this should not be allowed. From the very start before it is possible to determine whether or not the impugned words are defamatory it is necessary to determine their meaning. The meaning as pleaded by the plaintiff must first be considered in the light of what is pleaded by the plaintiff. If there is a direct challenge to this, then the court will evaluate this issue against any contrary meaning raised by the defendants. If the defendants made no direct contradiction to the meaning of the words as pleaded by the plaintiff, as in this case, then the court has to determine whether the impugned words are defamatory based on what is pleaded by the plaintiff. It is only after the court has decided that they are defamatory will the defence of justification be considered. Here, the defendants gave their own meaning to the impugned words in their defence of justification when prior to this made no direct challenge to the meaning of the words advanced by the plaintiff. If the defendants were allowed to adopt this approach then the court would be asked to decide on the meaning of the impugned words twice over. This would be unfair to the plaintiff who may have already proved to the satisfaction of the court that the meaning of the impugned words is defamatory based on what he has pleaded to have to re-argue on the meaning of the words once more when the defences of the defendants are considered. I support my proposition with two authorities.

[17] The first is *Rassam v Budge* [1893] 1 QB 571 at p 574. The facts of this case are: The defendant admitted in his defence that that 'he did say the following words' but proceeded to set out his own version of what he said, which differed materially from the words set out in the statement of claim. He then alleged that the words pleaded by him were true in substance and in fact, and were spoken on a privileged occasion. The defence was struck out as embarrassing and tending to prejudice the fair trial of the action.

[18] Another case of similar nature is *Brembridge v Latimer* (1864) 12 WR 878, where the declaration (now the statement of claim) set out part of a newspaper article accusing the plaintiff of base and ungrateful conduct. The defendant pleaded that words in the article charging bribery were omitted

from the declaration, and set out to justify the whole article. It was held that those pleas were rightly struck out as being calculated to prejudice, embarrass and delay the fair trial.

[19] In this case the High Court has found the impugned words to be defamatory based on the meaning as pleaded by the plaintiff. Since the defendants had made no prior direct challenge to the meaning of the words, the defence of justification can only be considered within the parameters of those pleaded by the plaintiff.

[20] Relying on this approach, I shall now proceed to consider each inference to the meaning of the impugned words raised by the plaintiff against the evidence tendered in the defence of justification.

[21] The first inference of the plaintiff to the meaning of the words is that:

> LAN has doubted the existence, validity and quality of St Clements University and Irish Business School.

[22] Here the organisation that doubted the existence, validity and quality of the two institutions which the plaintiff represented was LAN, not the British Council in Malaysia or the Ministry of Higher Learning. So to include British Council and the said Ministry for consideration is incorrect. As illustrated earlier, this is not the pleaded meaning of the plaintiff. Further, if allowed would open a floodgate for the defendants to bring in anyone they desire to satisfy their defence of justification. When narrowed down to only LAN's opinion, then the defendant must confine their proof of justification to this organisation alone to the exclusion of others. Since it is restricted to LAN's opinion, then it is my view that the defendants have failed to adduce convincing evidence to support the contention that LAN has doubted the existence, validity and academic quality of St Clements University and Irish Business School. This is based on the fact that LAN did not even know that these two institutions existed when the said circular was issued let alone the absence of evaluation by LAN on them.

[23] I am aware of the evidence given by DW 3, the representative of LAN who supported the defendants' contention that these institutions do not meet up to the standard of a university. But then, she was speaking generally and was using the yardstick that a university or college must have a campus and a teaching staff. But without an evaluation exercise conducted on them how she or LAN could confirm of any standard not being met. In fact, both DW 3 and LAN did not even know St Clements University and Irish Business School existed.

[24] The next pleaded meaning of the plaintiff is this: A

> The British Council has confirmed that St Clements University is part of the Irish Business School and the validity of these two institutions is in doubt.

[25] There is no evidence advanced by the defendant to justify this contention. On the contrary, the first defendant himself has admitted that Irish Business School is not under the same organisation as St Clements University. Though the representative of the British Council (DW1) was called to testify, his evidence was not on the issue of the validity of these two institutions. DW1 did not confirm that St Clements University is part of Irish Business School nor the validity of these two organisations was doubted by the British Council. B C

[26] The plaintiff's third pleaded meaning is: D

> The plaintiff for his personal gain had misled students by promoting degree courses from these two institutions whose validity, existence and quality is doubted by LAN and is therefore dishonest.

[27] Here again the focus is on LAN's doubt alone. As pointed out, how could LAN have haboured such doubt when they were unaware of the existence of these two institutions and had not conducted any evaluation and investigation on them? Correspondingly, how could the students in the second defendant have been misled? E F

[28] The next inference by the plaintiff is:

> The plaintiff is a cheat and is unfit to be engaged in the business of education.

[29] From the appeal record, I find no evidence advanced by the defendants to prove that the plaintiff has cheated anyone. No witness has come forward to say that the plaintiff has cheated him either by offering him a forged degree from the two institutions, or refusing to grant him a degree after having enrolled and completed a course or exercise conducted by these two institutions, or the degree so awarded by them is not recognised by the bodies or organisations claimed by the plaintiff. G H

[30] Though DW3 (the representative from the Ministry) has asserted that the plaintiff had collected thousands of ringgit from students in Malaysia but this was based solely on this witness own opinion that the plaintiff did not have the approval from his Ministry to conduct such courses. This claim is irrelevant to the issue of the degrees not being recognised. The degrees from these two institutions are accepted by MAICSA, AIA and even JPA except I

that the latter has a rider to say that any person holding such degrees must in addition also possess a first degree that is recognised by them.

[31] Then, there is a claim by the defendants that one of their students has obtained a Bachelor Degree in Malay Studies from St Clements University by merely writing a paper meant for his diploma course at the second defendant. However, this in my opinion does not establish as a fact that the plaintiff is a cheat and is unfit to be engaged in the business of education. The standard set by St Clements University may be low or at the level of a college such as the second defendant. But this does not mean that this student has been cheated of his degree by the plaintiff nor, as I have said, is his degree not recognised by the organisations claimed by the plaintiff that they would. Similarly, this reasoning applies with equal force to the inference that the plaintiff is not fit to be an educator.

[32] The last meaning given by the plaintiff to the impugned words is:

> The plaintiff by promoting degree courses in these two institutions had committed an offence under the PHEI Act which is punishable by a fine of RM100,000.00 and 1 year imprisonment.

[33] Regarding this, all I need to say is that the plaintiff is never charged for any offence under this Act. DW2 (the representative from the Ministry) only said that a person who commits an offence under the PHEI Act is liable to a fine of RM200,000 or a jail sentence of two years. But when a direct question was posed to him on whether the plaintiff has committed such an offence, his reply was that his Ministry will discuss the matter with its legal adviser and the attorney-general chambers before preferring charges. I would have thought that the best person to ascertain whether the plaintiff has committed an offence would be this witness but he stopped short of this. The very fact that legal opinions were required and a substantial time has lapsed since such consultations with the legal personalities without any criminal charges preferred against the plaintiff till date imply that the plaintiff has committed no such offence. Under these circumstances there is no justification for the defendants to publish the impugned words.

[34] Based on reasons aforesaid, it is my judgment that the defence of justification raised by the defendants is not proved.

QUALIFIED PRIVILEGE AND FAIR COMMENT

[35] The defendants claimed that they have raised two other defences: qualified privilege and fair comment. For the defence of qualified privilege, under para 6(b) of the defence the defendants asserted that they have a duty

to protect their students by informing them of the danger in enrolling in courses that are not recognised by the Government of Malaysia. Though these students may have a corresponding interest to receive such information, the fact remains that the publications were actuated by malice. This is the finding of the High Court when the learned trial judge said:

> On the evidence herein when DW4 (the first defendant) made the statement in the note and in this letter dated 21 April 2000 he knew they were untrue as admitted by himself during cross-examination and this fact is in itself express malice.
>
> DW4 also admitted that when he put the note he had not done any investigation as to its truth and that is why it is incorrect. To my mind this is an act of recklessness without concern to the truth.

[36] When there is malice in such publication, the defence of qualified privilege is nullified.

[37] On the defence of fair comment, I am doubtful that this was pleaded. All that the defendants said was this:

> Defendan-defendan menafikan kandungan perenggan 8 Penyataan Tuntutan dan meletakkan Plaintif atas beban bukti yang kukuh. Selanjutnya Defendan-defendan menyatakan bahawa mereka berhak membuat ulasan yang adil di dalam premis Defendan-defendan kerana:
>
> (i) Defendan Kedua ada menyediakan Pusat Penasihat Pelajaran (Education Counseling Center) dan khidmat dua (2) orang Penasihat Pelajaran (Education Counselor) untuk membimbing dan memberi nasihat kepada penuntut-penuntut Kolej Selatan tentang kursus-kursus yang dianjurkan oleh institusi-institusi pengajian tinggi tempatan dan di luar Negara;
>
> (ii) Antara lain (inter alia), Defendan-defendan bertanggungjawab melindungi kepentingan penuntut-penuntut dan membuat pertanyaan yang sewajarnya untuk memastikan mereka maklum sama ada kursus-kursus yang dipilih ada diiktiraf oleh Kerajaan Malaysia atau tidak;
>
> (iii) Defendan-defendan berhak melarang orang-orang lain dari menggunakan kemudahan premis Defendan Kedua dan nama Defendan Kedua untuk mengiklankan apa-apa kursus yang diragui atau yang mungkin tidak diiktiraf oleh Kerajaan Malaysia.

[38] Nevertheless, even accepting that this was pleaded, in order for this defence to succeed there must be an expression of an opinion, not a statement of fact. In short, the words complained of must be a comment rather than a statement made by the defendants — *Tun Datuk Patinggi Haji Abdul*

Rahman Ya'kub v Bre Sdn Bhd Ors [1996] 1 MLJ 393 at p 408, *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408, HC. From the impugned words, I found no expression of any opinion or a comment by the defendants. They are assertions of facts for which a defence of justification is more suitable — *Truth (NZ) Ltd v Avery* [1959] NZLR 274, but not for fair comment.

[39] Further, to succeed in a defence of fair comment there must be no malice in the publication. Since the High Court has found as a fact that the defendants were malicious in publishing the impugned words this defence of fair comment, even if proved, is unsustainable.

DAMAGES

[40] On the issue of damages, the defendants pointed out to us that there was a letter of apology (p 258 of the appeal record). But my impression of this letter is that the defendants were attempting to justify what they said rather than expressing remorse and regret for what they did.

[41] As regards to special damages suffered, I am of the view that the High Court has not erred in awarding RM980,000 since this was not only pleaded but also proved. The granting of RM50,000 for aggravated damages is also in my view correct since the defendants had not even checked the facts before publishing the defamatory words. As for loss of reputation, I think that a sum of RM100,000 instead of RM200,000 is more in line with the current range of damages awarded in defamatory cases.

CONCLUSION

[42] For reasons aforesaid, I would:

(a) dismiss this appeal with costs;

(b) order the deposit for this appeal to be paid to the respondent towards account of taxed costs; and

(c) affirm the order of the High Court dated 16 March 2006 except with a reduction of RM100,000 for damages to take into account the reduced sum of RM100,000 from RM200,000 awarded for general damages.

Zainun Ali JCA (delivering dissenting judgment):

[43] Before us, the defendant's appeal is against the whole of the judgment of the High Court at Johor Bahru delivered on 16 March 2006, which

allowed the plaintiff's claim. The High Court had found that the first appellant had committed the tort of libel against the plaintiff and awarded the plaintiff a sum of:

(i) RM200,000 as general damages;

(ii) RM50,000 as aggravated damages;

(iii) RM980,000 as special damages;

(iv) Interest at 8%pa on the sum or RM1,230,000; and

(v) Costs of the action.

[44] The defendant's primary ground of appeal was that the learned trial judge erred in rejecting the appellants' defence of justification and awarded aggravated damages without proof of any malice and special damages of RM980,000 based purely on speculative loss of profits.

[45] The defence of justification was specifically pleaded in para 10 of the amended defence, that in substance and in fact, the appellants were justified to state that the existence, legality and academic quality of 'St Clements University, UK' and 'Irish Business School' as institutions of higher learning are in doubt.

BACKGROUND

[46] The starting point of the discord between the plaintiff and defendant can be summarised thus. The plaintiff at the material time was the representative in Peninsular Malaysia, particularly in Johor, of two institutions of higher learning ie (a) St Clements University of Turks and Caicos Island, British West Indies (St Clements University) and (b) Irish Business School of Dublin, Ireland (Irish Business School), (hereinafter referred to as 'the two institutions').

[47] The plaintiff had on a couple of occasions, promoted the degree programs offered by the two institutions to students of the second defendant.

[48] The students of Southern College (ie the second defendant) were largely studying for a diploma or a certificate. The plaintiff's selling point was that some degree qualifications from these two institutions would be accepted by the Malaysian Association of the Institute of Chartered Secretaries and Administrators (MAICSA) and the Association of International Accountants (AIA). The Jabatan Perkhidmatan Awam (JPA) would also accord recognisition, on condition that the holder of such a degree has already gained a first degree from another university which JPA recognises.

[49] The first defendant is an advisor to the Southern College. He was formerly its chief executive. Southern College is a non-profit private college, funded by public donation.

[50] In defamation suits such as this, it would be helpful if the characters involved, their standing in society, the sequence of events, the words written and ascribed to the defendant construed to be offensive, the meanings attributed to them, the context in which they were written, their accuracy, precision or nuances, all need to be considered. The reason is simple. Although a small part of the law of defamation has been codified in our Defamation Act 1957, defamation is largely fraught with technicalities.

[51] Questions of burden of proof, identification, publication and the various defences available to the defendant are in themselves notable for their intricacy.

[52] In this context, it is crucial to elicit from the evidence what was the relationship between the parties; how and when did they get into contact with each other? What transpired between them; what is the understanding they had etc.

[53] A brief background of each of the parties will undoubtedly assist us here.

[54] The plaintiff is basically a man with many 'hats'. He acts as agent for educational and professional courses run by foreign universities and professional bodies; he is an education counselor; he is also an accounting/taxation consultant and also acts as a life insurance agent.

[55] It was his enterprising nature that led to him getting in touch with one Dr David Le Cornu, of St Clements University in 1995, after reading about an advertisement regarding the same. The plaintiff was able to persuade Dr Le Cornu to appoint him as the agent in Malaysia, particularly in Johor for St Clements and their affiliated institutions in respect of educational programs. (see witness statement para 7).

[56] According to the plaintiff, St Clements University is a private university registered in Turks and Caicos Islands, British West Indies since 1995.

[57] Between 1994–1996 the plaintiff approached the defendant, offering to introduce various programs which he claimed would or could improve the

academic qualifications of the students of the Southern College in conjunction with the programs organised by the two institutions.

[58] On 2 January 1996 with the defendant's approval, the plaintiff briefed the students of Southern College on courses offered by these two institutions. There were two more subsequent briefings by the plaintiff on the same.

[59] Thus generally, the plaintiff acts as a promoter and facilitator who makes arrangements for students of Southern College to sign up for programs or courses offered by the two institutions.

[60] As regards the first defendant in addition to those earlier stated, his evidence was that the plaintiff had offered him a Doctoral degree from St Clements University, UK. The first defendant testified that he was under the impression that the said University was actually in the UK. He accepted the offer, after complying with the requirements imposed by the plaintiff.

[61] In the course of things, sometime in 1999 the National Accreditation Board (LAN) issued a circular dated 20 August 1999, a copy of which was sent to Southern College. Basically this circular indicated that the existence and quality of three foreign institutions, ie:

(a) St George University International (Established in the Turks and Caicos Islands);

(b) Europe University Ireland; and

(c) The Irish School of Economics and Management.

are in doubt, and that LAN will not process the academic certificates issued by them.

[62] The Southern College then made an addendum at the bottom of the said circular as follows:

Note:

Confirmed with British Council (UK)

1. St Clements University is under Irish Business School
2. No information about St George University
3. The three Universities listed above are NOT in UK

[63] (Please see circular attached for its full effect, marked as P20)

A This said circular (P20) was displayed by Southern College on its notice board.

[64] A couple of months later, ie on 21 April 2000, the first defendant issued a circular to students and staff of the second defendant. This document B is marked exh P23. It is reproduced here in its entirety (see attached circular, P23).

[65] This circular P23, basically states that:

C (a) information was received from one Yian, a parent that lecturers form Southern College have joined with an outside organisation to introduce degree courses of St Clements University and Irish Business School in Southern College;

D (b) Southern College had in August 1999 brought to the attention of lecturers & students the LAN notice which points out that the legality, existence and academic quality of St Clements University and Irish Business School were in doubt;

(c) that LAN will not process nor recognise any degree conferred by them E (the two institutions).

ON WHOM LIES THE BURDEN

[66] It is trite that in any action for libel the plaintiff must prove that the F matter complained of:

(i) is defamatory;

(ii) has been published to a third person (publication); and

G (iii) refers to the plaintiff.

[67] These three essential ingredients must be proved by the plaintiff, failing which his action is bound to fail.

H **[68]** It is of course presumed in defamation cases, that the matter complained of is untrue and that damage has been caused to the plaintiff. Which means that the burden lies on the other foot — ie it lies on the defendant to prove:

I (i) that the matter complained of is true and

(ii) that it has not caused the plaintiff damage.

[69] It is also important to note that the question of whether the defendant intended to defame the plaintiff is irrelevant (*Hulton (E) & Co v Jones* [1910] AC 20).

WERE THE WORDS DEFAMATORY

[70] The plaintiff says that the words contained in P20 and P23 are defamatory. In P20, the impugned words were those in the note. Taken in the context of the LAN circular are the words defamatory?

[71] The learned trial judge read P20 together with P23 and said that that the salient features of P23, when juxtaposed with P20 and taking into account testimonies of witnesses 'imply by innuendo that the validity, existence and quality of St Clement University and Irish Business School was also doubted by LAN and confirmed by the British Council. The ordinary person who saw the note on the college notice board like SP3 it is submitted will invariably conclude that the plaintiff is a cheat and dishonest person who sold to them worthless degree programs of universities whose existence are in doubt and hence it is defamatory of the plaintiff'.

[72] Thus the learned trial judge was of the view that the plaintiff's submission is 'meritable' and thus found defamation has been made out against the plaintiff.

PUBLICATION TO THIRD PERSON

[73] It was in evidence that both the note in P20 and P23 were published. Whilst it was LAN which wrote P20, it was a staff of Southern College who wrote the note on P20 which was pinned on the Southern College's Notice Board.

[74] P23 was written by the defendant. P23 was addressed to all students and lecturers of Southern College.

[75] Clearly here the issue of publication to third parties is established.

PROOF OF IDENTIFICATION

[76] The third and final issue to be proved by plaintiff is whether on a balance of probabilities the words complained of refer to the plaintiff. Unless it is proved that the subject matter of the action was published and concerning the plaintiff, the action is bound to fail.

[77] It is not necessary that the plaintiff is referred to by name. The plaintiff can be referred to by caricature, nickname, drawing etc.

[78] In this case, the plaintiff was not named. The learned trial judge cited cases such as *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408, *Chew Sew Khian @ Chew Hua Seng v Saniboey Mohd Ismail & Ors* [2003] 5 MLJ 91, *Le Mercier's Fine Furnishings Pte Ltd v Italcomm (Malaysia) Sdn Bhd* [1996] 3 CLJ 590 and decided that although the plaintiff was not named in the impugned words or statements; 'it is sufficient if those who knew him can make out that he was the person referred' (p 24 of the AR).

[79] The learned judge explained that this is because the defendant had admitted that the plaintiff had given briefings to students and staff of the Southern College and that from the evidence of SP2, 'most lecturers and students in Southern College (second defendant) knew the plaintiff and his firm L & G Consultant and Education Services being the sole representative of St Clements University and Irish Business School in Johor'.

[80] The learned judge said that this fact is a special fact known to all lecturers and students of Southern College. The judge observed that the words 'outside organisation' mentioned in P23 in this context refer to the plaintiff and his firm L & G Consultant and Education Services. The learned judge concluded that the defamatory words in P23 therefore refers to the plaintiff and since there is publication it is defamatory of him and hence the plaintiff's claim of defamation has been made out.

[81] The learned judge then went on to discuss fairly lengthily the defence put up by the defendant ie justification. Though the defendant claims that the defence of qualified privilege was put up, the learned judge found that that defence was imprecisely formulated.

[82] In any case, after a thorough analysis of the evidence before him, the learned judge found that the defendant had failed on a balance of probabilities, to defend the plaintiff's claim of defamation. The learned judge granted the plaintiff's claim and ordered damages as are found in his order.

[83] So there you have it. In my view the entire claim of the plaintiff is merely hogwash and is thus untenable. And it must fail. My reasons are as follows.

[84] Getting down to basics, one has to scrutinise the plaintiff's claim, discern and analyse whether he has discharged his burden on a balance of probabilities, before we cross the next threshold.

[85] The starting point, in most defamation cases is that the court will only be concerned with the natural and ordinary meaning of the words claimed to be defamatory. This is the meaning that an ordinary, reasonable person would derive from the words, without any special knowledge beyond that which is known to ordinary people generally. Alternatively it is how the words would be understood by 'the man in the street'. Or to put it in another way, as understood by 'Joe public'. Which means that the plaintiff must identify what he claims to be the natural and ordinary meaning of the words as understood by the ordinary reader.

[86] In this context the natural and ordinary meaning includes innuendos, ie something which is insinuated in or inferred from the words.

[87] The determination of meaning of the impugned words involve both a question of fact and law. The actual meaning of the publication is a question of fact. However the court has a preliminary power to hold that the words are not capable of bearing a particular meaning, which is a question of law. In short, *where the words are not capable of bearing the pleaded meaning, that meaning will be struck out*. (Emphasis added.)

[88] The plaintiff's claim in his amended statement of claim is that the impugned words in P20 and P23 meant that:

9.1 it gives the impression that LAN had doubted the validity, existence and quality of St Clements University and Irish Business School;

9.2 that British Council had confirmed that St Clements University is part of Irish Business school and that the validity, existence and quality of both institutions are in doubt;

9.3 that the Plaintiff for his own selfish financial gain had confused students in promoting the degree programs of St Clement University and Irish Business School when their validity, existence and quality are doubted by LAN. This shows that the Plaintiff is a dishonest man;

9.4 that the Plaintiff is a cheat and is not qualified to be involved in the business of education;

9.5 by promoting the degree courses of St Clements University and Irish Business School, the Plaintiff had committed an offence under Akta Insitutusi Pendidikan Tinggi Swasta 1996, which is punishable with a fine of RM100,000 and one year's imprisonment).

[89] The next question would be this: Are the impugned words in P20 and P23 capable of bearing the pleaded meaning above?

[90] In this connection, how the words are to be construed involves an objective test (see *Youssoupoff v MGM Pictures Ltd* (1934) 50 TLR 581, CA; and *Tolley v JS Fry & Sons Ltd* [1931] AC 333).

[91] For example in *Dwek v Macmillan Publishers Ltd* [2000] EMLR 284, the defendants were the publishers of a biography of Mohammed Al Fayed. One of the photographs in the book showed a young woman sitting between two men on a sofa. The caption identified the young woman as a prostitute and one of the men as Dodi Fayed. In fact it was not Dodi Fayed but a dentist named Norman Dwek. The Court of Appeal concluded that an ordinary reader reading between the lines was capable of concluding that the person wrongly described as Dodi Fayed would have had sex with the woman described as a prostitute.

[92] What exactly are the impugned words in the note to P20 and P23 which the plaintiff claims is defamatory of him?

[93] One must not lose sight of the fact that the plaintiff is a promoter of educational programs of several learning institutions, amongst his multifarious function. For an allegation to be considered defamatory, it must impute to the plaintiff, either some quality which would be detrimental to the successful carrying on of his office, profession or trade, or the absence of some quality which is essential to its success. The failing may be a lack of judgment, an allegation which in itself might not be considered to involve any moral fault.

[94] In this, there is an element of subjectivity in the test. Let us now look closer at the Note in P20 and the contents of P23.

[95] The note in P20 says it was confirmed by British Council that St Clements University is under the Irish Business School. That is all. There is no explicit allegation of adverse remark or comment about either the plaintiff or the two institutions. By itself, the note in P20 is in fact bland. In this note, there is no suggestion or insinuation that the two institutions are in doubt. The note in fact, is quite cryptic.

[96] In any event, the plaintiff says that the impugned words are to be construed by reading both the note in P20 and P23 together. What are the contents of P23?

[97] In P23 the defendant had stated that LAN in its previous circular (P20) had indicated that the validity, existence and quality of certain named universities are in doubt. The defendant went further to state that LAN had also attributed the same quality with regard to the two institutions: ie that

LAN considers that the validity, existence and quality of both St Clements University and Irish Business School to be in doubt.

[98] Now, whether this is true or otherwise is not relevant at this point, since it is deemed to be true for purposes of this action. Assuming it is, is this defamatory of the plaintiff?

[99] That is the crux of the issue that falls to be considered. In my view, if at all, the defendant is guilty of criticising the two institutions. Not the plaintiff. The defendant is guilty if at all, of condemning the 'product' promoted by the plaintiff, the 'product' being the degrees of St Clements University and Irish Business School. There is nothing to suggest that the defendant, whether explicitly or implicitly, criticised or condemned the plaintiff.

[100] The note in P20 and the contents of P23 did not, for instance contain words such as:

> ... Dr Lim Shian Ghee promotes the degrees of St Clements University and Irish Business. LAN had held the validity, existence and quality of these two institutions in doubt. We are now doubting the integrity of Dr Lim.

Or

> ... where is the professionalism of Dr Lim Shian Ghee in promoting the degrees of St Clements University and Irish Business School, when LAN had expressed doubts about them?

[101] Or words to that effect.

[102] The impugned words do not contain allegations of lack of integrity or 'sharp practices' of the plaintiff. The impugned words do not state that the plaintiff is unfit for his profession, calling or trade or even that he has been guilty of a lack of care or judgment.

[103] The impugned words do not cite the plaintiff's absence of professionalism or lack of competence. Though I am aware that there are authorities where courts are conscious of the difficulty in divorcing the 'product' (or technique) from the 'producer' or even whether the criticism of a professional's technique amounts to imputation of a lack of competence, my view is that a distinction must be made between impugning the 'product' or impugning the 'professionalism' of the plaintiff. Though sometimes it overlaps. For example:

[104] In *Drummond-Jackson v British Medical Association & Ors* [1970] 1

WLR 688 the Court of Appeal held that an attack on the special technique of a dentist was arguably capable of defaming the dentist. However in this case Lord Denning dissented.

[105] My view is this. Where the criticism relates solely to the plaintiff's product and not to the plaintiff it will not be defamatory. In this connection the note in P20 and the contents of P23 relate not to the plaintiff but to the two institutions which he promoted.

[106] I am mindful though, that the distinction between an allegation relating to the competence and judgment of the plaintiff as opposed to merely his products or his goods (in this case, the degrees of St Clements University and Irish Business School) may be difficult to make. But in my view even if the distinction is fine, the distinction must be made for it will impact on the question of liability.

[107] This is important because case laws have shown that where the impugned words focus on the product (in this case, the two institutions) rather than the supplier of the product (ie the plaintiff), defamation is not made out. The succinct observation of Lord Esher MR in *South Hetton Coal Co Ltd v North Eastern News Association Ltd* [1894] 1 QB 133 is that:

> Suppose the plaintiff was a merchant who dealt in wine, and it was stated that wine which he had for sale of a particular vintage was not good wine; that might be so stated as only to say that the wine of the particular year was not good in who-soever hands it was, but not to imply any reflection on his conduct of his business. In that case the statement would be with regard to his goods only and there would be no libel, although such a statement, it if were false and were made maliciously with intention to injure him, and it did injure him, might be the subject of an action on the case (ie malicious falsehood). On the other hand, if the statement was made so as to import (or indicate) that his judgment in the selection of wine was bad, it might import a reflection on his conduct of his business, and show that he was an inefficient man of business. If so, it would be a libel. In such a case a jury would have to say which sense the libel really bore; if they thought it related to the goods only, they ought to find that it was not a libel; but, if they thought it related to the man's conduct of business, they ought to find that it was a libel.

[108] In my view what can be discerned from P20 and P23 is that the defendant was concerned with the quality of the two institutions. One must remember that the defendant was the chief executive of the Southern College (second defendant) at that time.

[109] That concern is manifested in both P20 and P23. His concern was that the degrees of the two institutions were in doubt. He was not concerned with the demonisation of the plaintiff. Otherwise the impugned words would

as I had earlier illustrated, be couched along the lines indicated in my illustration. The intended meaning is of course irrelevant. A

[110] In my view, the end result is that given the authorities, facts and circumstances of this case, the impugned words are not capable of bearing the pleaded meaning. However, if what I had stated above is insufficient to conclude that the impugned words are not of themselves defamatory, a test which would assist us in this quest is to see whether the defamatory allegation is one that tends to make reasonable people think the worst of the claimant. (*Sim v Stretch* (1936) 52 TLR 669). B C

[111] Is the plaintiff shunned or avoided as a result of the defamatory allegation? Is the plaintiff ridiculed, or exposed to hatred and contempt?

[112] Though it is true that the way in which the words were in fact understood is irrelevant, it would be so, in determining the extent of injury to the plaintiff's reputation. D

[113] The plaintiff had two witnesses for this purpose. His first witness one Tan Man To, SP2, was a lecturer in the Southern College from October 1995 to 31 March 2000 (ie within the time frame the impugned circular P20 and P23 was put on the notice board). E

[114] SP2 was awarded a Doctor of Letters by St Clements University. On 3 October 1997 he was made an honorary local academic adviser to L & G Consultants & Education Services (the company owned by plaintiff). Note that SP2's main duty as local academic advisor was to advise the plaintiff (who is St Clements University local academic counselor) on matters which will assist the development of St Clements University/L & G Consultant and Education Services joint degree program (please see SP2's written statement, para 9 p 189 AR). F G

[115] According to SP2 when he saw P20 on the notice board of Southern College, some of his colleagues in Southern College began to ridicule him saying that the doctorate he obtained from St Clements University was illegal and that St Clements University was cheating people. H

[116] Note that the above statement was not verified. No one was called to testify as to its truth. The butt of the ridicule if at all true, going by SP2's own admission is himself, *not* the plaintiff. I

[117] When the second circular dated 21 April 2000 (P23) was up on the notice board of the Southern College, SP2 had by then left the Southern

College (he left on 31 March 2000). SP2 said he subsequently received a copy of P23 from his ex-colleague of Southern College ie one So Tang Heng.

[118] SP2 testified that upon reading P23, he concluded that it referred to the plaintiff. He proceeded to make a copy of it and gave it to the plaintiff (para 21 p 192 of the AR).

[119] It is SP2's evidence that in view of P20 and P23, there is prejudice amongst students and teachers of Southern College towards degrees from St Clements University and Irish Business School. SP2 testified that the course content of students taking the accounting course had recently been amended. This would at some point result in Southern College and the two institutions competing for the same pool of university students to register for the degree programs of either the program designed by Southern College or that of the two institutions. In short, SP2 said that Southern College is a rival contender with the two institutions for the 'patronage' of the students.

[120] However this evidence too, is hearsay. SP2 testified that one Ms Tan Hui Chi (lecturer of Southern College) was responsible for the change in the course content and whose prejudice against the two institutions led to the note being put on P20 (see para 18 p 191 of the AR). But verifies this statement? No one.

[121] Likewise for the second circular (P23) not a single witness was called forth to verify an otherwise conjectural opinion of SP2, which is exacerbated by hearsay.

[122] Given the range of spectrum of meanings which an ordinary reader might attach to the words, would the words of SP2 come within the range necessary to impute defamation?

[123] In other words, would SP2's testimony pass the test of it being the impression of reasonable or right-thinking people upon reading the impugned words?

[124] In my view, it does not. My reasons are simply these.

[125] Firstly, SP2 is not an independent witness. Although case laws do not suggest any bar to obtaining views of interested parties, his view cannot be said to be representative of the view of the ordinary man in the street. His value does not reflect those 'right-thinking' people, simply because he is not one of them — for he is himself associated with the plaintiff and the plaintiff's company. It might be recalled that SP2 was made the local

academic advisor to the plaintiff (the plaintiff being the local academic counselor) on matters which will assist the development of St Clements University and L & G Consultant and Education Services joint degree program (see para 9 witness statement p 189).

[126] There is nothing in evidence to suggest that SP2 had severed his ties with the plaintiff or the plaintiff's company. SP2 has links with both the plaintiff and St Clements University, for he obtained his Doctor of Letters from St Clements University after paying RM12,000 for it and professorship was conferred on him by St Clements University.

[127] SP2's strong connection with the Plaintiff and his company is clearly seen in evidence, when SP2 admitted that he conducted other courses for St Clements University (like Business Management, Psycho-Philosophy) — and gave tutorials conducted by e-mail, telephone, fax and he occasionally met students on a one to one basis. For all that, he received payment from the plaintiff (see p 133 of the AR). SP2 is inextricably linked to the plaintiff.

[128] In view of the foregoing can it therefore be said that SP2's opinion or impression of the impugned words are those of ordinary, right-thinking people? I think not.

[129] Thus SP2's evidence is of little or no probative value to support the plaintiff's claim.

[130] The plaintiff's one other witness was Loo Nic Kee (SP3). SP3 was a former student of Southern College. He had a pass in his Southern College Diploma and with a 500 word thesis, was awarded a BBA degree from St Clements University. He obtained this through the plaintiff. SP3's evidence was that the plaintiff was the sole representative of St Clements University and Irish Business School. SP3 also said that the plaintiff had given talks in the college premises on this degree program. He said that lecturers of Southern College had referred students to the plaintiff regarding applications for enrolment into the degree programs of the two institutions. SP3 went on to say that any reference to any unnamed person or organisation introducing St Clements University and Irish Business School degree program in Southern College must refer only to the plaintiff of L & G consultants and Education Services and no one else.

[131] SP3 said that he happened to visit Southern College and after reading P20, formed the impression that LAN considers that the validity, existence and quality of St Clements University was doubtful.

[132] It is noted that SP3 had not seen nor read P23. Apart from reading

A the note made in P20 and *without* the benefit of reading the contents of P23 for the full effect and impact of the impugned words, I find SP3's testimony on the meaning to be attached to the impugned words in P20 to be contrived and false therefore worthless, and is of no probative value.

B **[133]** What is the basis of SP3's construction that LAN was of the view that the validity, existence and quality of the two institutions were doubtful when he was not privy to P23? It defies logic. SP3's evidence certainly carries no weight and to my mind, should suffer the same fate as the evidence of SP2.

C

[134] SP2's and SP3's evidence made up the total part of the plaintiff's case. No one from the current student body or lecturers of Southern College were called to testify. No one, least of all the court, was appraised of their view and impression the two circulars P20 and P23 made on degrees offered by the

D two institutions and the impression they had if any, of the plaintiff.

[135] In other words the view of right-thinking and ordinary members of the public was not available. Since I find that the views of SP2 and SP3 cannot be said to represent the views of ordinary, right thinking members of

E the public (for reasons already stated), the plaintiff's claim is not on solid ground.

[136] An important aspect which seems to escape the learned judge is this.

F If at all SP2 and SP3 represent the view of right thinking or reasonable people, there is nothing in their testimony which indicate that the defamatory words had lowered the plaintiff in the estimation of right-thinking people.

G **[137]** All that SP2 said with regard to this aspect is that LAN's misgivings had caused HIM to be ridiculed by his colleagues in Southern College. He was more worried about the value now placed on his doctoral degree awarded by St Clements University.

H **[138]** At no time did he testify (whether in his written statement nor in his evidence in court) that the defamatory words in P20 and P23 resulted in students and lecturers now to view the plaintiff with suspicion, ridicule, hatred or contempt.

I **[139]** In fact the standing and self-worth and reputation of the plaintiff did not feature at all in SP2's evidence. SP2 was more worried and concerned the impact this had on the worth and value of his own degree. He said nothing about the effect the impugned words had on the plaintiff, as if indifferent to it.

[140] The same can be said of SP3. Nary a thought was given by SP3 to anybody's estimation of the plaintiff, in the light of LAN's circular. Likewise, SP3 was more consumed with worry about the value to be now placed on his degree from St Clements University.

[141] If both SP2 and SP3, as the ONLY witnesses to advance the plaintiff's claim gave no evidence whatsoever as regard the impact the defamatory words had on the plaintiff (their claims of ridicule or contempt by students and lecturers being hearsay) the plaintiff has no leg to stand on at all and thus the first ingredient ie whether the impugned words are defamatory or otherwise, are not proven.

PUBLICATION

[142] Insofar as the issue of publications is concerned, it is not in dispute that P20 and P23 were in fact published. Since the learned trial judge had correctly stated this position, I shall desist from deliberating this point.

IDENTIFICATION

[143] To succeed in an action for defamation, the plaintiff must not only prove that defamatory words were published, he must also identify that the person defamed refers to him. It is trite of course that the plaintiff need not be referred to by name. The test is whether the plaintiff may reasonably be understood to be referred to by the words (see *Gatley on Libel and Slander* (9th Ed) p 166).

[144] A claimant such as the plaintiff must identify himself as the subject of the defamatory material. Since the impugned words in P20 and P23 did not name the plaintiff, the identification of the claimant can arise by virtue of the 'natural and ordinary' meaning of the words. As in cases of unnamed claimants, identification can be made by innuendo. The claimant must prove by direct evidence or inference that there are readers who knew it refers to him since they have some particular knowledge to be able to identify him as such.

[145] The test is whether reasonable readers generally or a reasonable reader with the particular knowledge would understand the statement to refer to the claimant. Mere conjecture that it might refer to the claimant is insufficient (see '*Defamation' Law Procedure and Practice* (3rd Ed) by David Price and Korieh Duodu).

[146] The question is whether or not the words are reasonably capable of being understood to refer to the claimant. The leading authority is *Knupffer*

v London Express Newspapers Ltd [1944] AC 116, HL in which the plaintiff was represented by the British branch of the Young Russia Party. The party numbered 2,000 and the British branch had 24 members. The allegation in a British newspaper was that the party was pro-Hitler, but there was no reference to any particular member in the article. The Court of Appeal held that the words were not capable of referring to the plaintiff, as opposed to the party, which was upheld by the House of Lords.

[147] In another case, *Riches & Ors v News Group Newspapers* [1986] QB 256, CA, the News of the World repeated various allegations of misconduct against 'Banbury CID'. Only one officer was named. There were twelve officers at Banbury CID, ten of whom brought a claim for libel and were able to show that the allegations would have been understood to refer to them.

[148] In the instant appeal, the impugned words in P23 were:

> ... Few days ago, it was informed through telephone by a student's parent, Yian, that *there are lecturers from this college joined with outside organisation to introduce the 'degree' courses of St Clements University and Irish Business School in Southern College*.

[149] The said circular P23 went on in the next paragraph, about LAN's notice pointing out that the validity, legality and quality of the two institutions were doubted.

[150] Although the plaintiff has set out in the statement of claim the facts and circumstances which show that the words can reasonably be construed as referring to him, in my view it cannot be said that any person reading it would immediately understand the words to refer to him (*Morgan v Oldhams Press Ltd & Anor* [1971] 2 All ER 1156).

[151] The plaintiff argues that there are 'special facts' which would ensure that ordinary persons would understand the words to refer to him. The said 'special fact' relied on by the plaintiff is this: that when he gave talks to students in Southern College, they *knew* that he was the *sole* representative of the two institutions.

[152] Is this true? From the record the evidence that the plaintiff is the sole representative of the two institutions came from the plaintiff himself and his two witnesses SP2 and SP3. They also alluded to the fact that most students and teachers of Southern College also knew of this fact. But as I had indicated earlier the veracity of this fact has not been determined. Whilst the plaintiff

kept harping on the fact that most students and lecturers of Southern College knew of it, in my view, hearsay evidence on this point is certainly not going to help the plaintiff.

[153] In as much as the impugned words refer to a determinate class ie lecturers from Southern College and this class is not large and disparate, the said special fact is not particular nor exclusive to the plaintiff.

[154] As Lord Atkin observed in *Knupffer*'s case:

> The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. It is irrelevant that the words are published of two or more persons if they are proved to be published of him, and it is irrelevant that the two or more persons are called by some generic or class name. There can be no law that a defamatory statement made of a firm, or trustees, or the tenants of a particular building is not actionable, if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a factious exaggeration.

[155] So the test is:

[156] Would reasonable persons understand the words to refer to the particular plaintiff?

[157] Factors to be considered in deciding this question are, as Lord Porter pointed out in *Knupffer*'s case 'the size of the class, the generality of the charge and the extravagance of the accusations'.

[158] The operative words are 'lecturers from this college ...'. Who, then are lecturers from Southern College who had joined with an organisation outside of the college to introduce the degree program of the two institutions?

[159] As evidence had shown, the plaintiff had NOT at any time, been employed by Southern College as a lecturer. The plain and obvious meaning of the impugned words would be a person who is on the board of teaching staff of Southern College. It refers to a defined class, ie lecturers of Southern College. How many lecturers in Southern College are there? And out of that group, how many of them are affiliated with an 'outside organisation' to introduce the degree courses of the two institutions?

[160] In this regard, it is interesting that SP2 in his witness statement at para 22 said that the words 'lecturers from this college' may or may not refer to him. He stated that this was because he left the college as lecturer on 31 March 2000. The said circular P23 was dated 21 April 2000 ie about three (3) weeks after SP2 left. It is also noted that there is at least one other lecturer in Southern College who was linked to the two institutions. She is one Ms Lim Sai Koon who graduated from Irish Business School.

[161] Both SP2 and Ms Lim had degrees from St Clements University and Irish Business School respectively. Both SP2 and Ms Lim are lecturers in Southern College.

[162] Whilst there is no evidence of Ms Lim being associated in any way with an 'outside organisation' to promote degrees offered by the two institutions, SP2 was very much involved with an 'outside organisation' to introduce the said program of the two institutions.

[163] Between them, it is very probable or likely that it could refer to SP2 rather than Ms Lim. But the fact remains that it could be either one of them.

[164] Now let us consider the position of the plaintiff and consequently his fate in this action.

[165] What we have in evidence is that he is a promoter of the degree programs offered by the two institutions. He had given talks on at least two occasions (one in 1996 and one in 1997) to students of Southern College regarding the degree courses offered by the two institutions.

[166] The plaintiff claimed that many students had enrolled in the programs of the two institutions through him. As such he said, the students and teaching staff knew that he was the sole agent of the two institutions. But there is nothing in evidence to substantiate this claim either by the two institutions or any other educational body. The plaintiff's job is merely to promote the degree program of the two institutions. He is in short, an agent of the two institutions, introducing their programs to students.

[167] He is not on the teaching staff of Southern College. He is certainly not a lecturer there. What he did there was merely to 'sell' the degree programs for commercial expedience. To equate a promoter of goods or services such as the plaintiff, with that of a lecturer, lecturing and imparting knowledge to students is surely stretching it a bit.

[168] In short, what the plaintiff does for a living, is far removed from what a lecturer does. So how could the plaintiff imagine for a moment that he is the person referred to in P23? A

[169] The circumstances strongly indicate that the description in P23 fits SP2 accurately. Consider this. SP2 was a lecturer at Southern College until he resigned just three (3) weeks before P23 was written. SP2 in his testimony clearly testified that he helped introduce the degree programs of the two institutions. These programs are not those contained in Southern College's syllabus, thus it qualifies being construed as programs of an 'outside organisation'. B C

[170] Logically, the use of the word 'outside' when referring to the organisation meant that the said organisation bears no link or relationship with Southern College. Thus the words 'lecturer' from Southern College is understood to mean just that — that the person referred to is one who is employed by Southern College. In this context it is SP2 who belongs or once belonged to the college. And when that word is tested against the word 'outside organisation', it can only mean that it refers to SP2 or someone having the same qualification or attribute like him ie employed and on the payroll of Southern College having 'links' with an outside organisation to introduce degrees of the two institutions. D E

[171] In that context, it cannot refer to the plaintiff *who does not belong to Southern College*. For otherwise, the word 'outside organisation' does not make sense; since the plaintiff is already an outsider, as it were. F

[172] Is this interpretation correct? Is the person someone who lectures in the college and has links or is affiliated with an 'outside organisation' to introduce the said degrees? G

[173] Consider this. Whilst still a lecturer at Southern College, SP2 was asked by St Clements University by letter dated 3 October 1997 to be an honorary local academic advisor to L & G Consultants and Education Services (see para 9 witness statement p 189 of the AR). H

[174] SP2 stated that his main duty is to advise the plaintiff (as St Clements University local academic counselor) on matters which will assist the development of St Clements University/L & G Consultants and Education Services joint degree program. Thus the word 'outside organisation' could refer to L & G Consultants and Education Services Ltd or it could well refer to St Clements University itself. From all accounts therefore, SP2 definitely has a stronger and better claim than the plaintiff to be the person referred to in P23. I

[175] The question is — what then gave the plaintiff the idea that the impugned words refer to him and that he has been maligned? There is no reason for him to imagine himself to be the intended object of the impugned words, since it is unclear who, among the 'lecturers in this college' is the villain, when the plaintiff cannot even pretend to be *one* of the lecturers to begin with.

[176] On those grounds, I find that the plaintiff's delusional stance should not influence what is clear — that the plaintiff has failed to prove that he is the subject of the alleged defamation.

[177] Enough said. I am clearly of the view that the plaintiff has failed to prove two of the most important ingredient of his claim ie that the statement or impugned words (in P20 and P23):

(i) is defamatory and

(ii) refers to him.

[178] This naturally means that the defendant's defences do not arise. However it behoves me to make an observation on the approach taken by the learned trial judge in dealing with this action.

[179] After having found that the plaintiff had proven his claim of defamation, the learned trial judge proceeded to consider the defendant's defence of justification.

[180] In so doing what emerged were instances of misdirection by the learned judge.

[181] In concluding that the plaintiff's submission is 'meritable', the learned trial judge made erroneous findings of facts, leading to misdirections in law.

[182] Firstly the learned trial judge had presumed without more, as a matter of fact, that St Clements University, UK and Irish Business School exist as universities, conducting tuition of acceptable standard and awarding university degrees. Thus the learned trial judge had proceeded upon the presumption that St Clements University, UK and Irish Business School are institutions of higher learning and that their existence, legality and academic quality were not in doubt.

[183] Obviously the trial judge was unable to discern the truth — that St

Clements University is a company registered in Turks and Caicos Island and Irish Business School is only a registered name. A

[184] Secondly whilst the defendant admitted that to say that St Clements University is under Irish Business School as written in the note in P20 is incorrect, the learned trial judge failed to see that this was jotted down in P20 *only after the defendant obtained oral information of this fact from the British Council*. Although this was done before investigations were made, the defendant had categorically stated at p 149 of the AR that: B

> Ya, telah terima pengesahan lisan dari British Council bila nota dicatitkan. C

[185] The defendant's testimony above was not challenged by the plaintiff.

[186] The learned trial judge glossed over the fact. He found that the note juxtaposed with the LAN circular which doubted the validity, existence and quality of three totally unrelated but similar sounding names of universities located in similar places clearly intended to imply by innuendo that the validity, existence and quality of St Clements University and Irish Business School was also doubted by LAN and *confirmed by the British Council*. If the learned trial judge believed that the British Council holds the above view, then by necessary implication, the defendant's alleged defamatory words are true, and therefore justified. Yet the learned trial judge later, held otherwise. D E

[187] The learned trial judge's misdirection continued in the latter part of his judgment. At p 32 of the AR he stated that: F

> ... In 1999 when the British Council reported to LAN on St George University International (established in Turks and Caicos Islands) it must have also known of St. Clements University established in the same place as St Clements University was in existence since 1995. The fact that the British Council did not mention St Clements University to LAN *because there had been nothing adverse about it.* G

[188] The learned trial judge's reasoning above is baffling. It is almost perverse. In the first place, there is nowhere in evidence that the *British Council* reported to *LAN* on St George University International. In the second place, it is highly presumptuous for the learned trial judge to blithely state that because St George University International is established on Turks and Caicos Island, then LAN must have also known of St Clements University since it is also established in the same place (Turks and Caicos Island). For the learned trial judge to carry on in the same vein — that the British Council did not mention St Clements University to LAN *because* nothing adverse was reported about it, is surely preposterous on account of it being both untrue and speculative. H I

[189] How the learned trial judge arrived at this conclusion is completely beyond me. In this regard, the learned trial judge had clearly misdirected himself.

[190] Thirdly, the learned trial judge proceeded to find that the defendant was actuated with express malice when the note in P20 and P23 were drawn up and circulated to students.

[191] This is how the learned trial judge expressed this point: p 37 of the AR:

> ... SP2 (plaintiff's second witnesses) in para 16 and 17 confirms this, that Bachelor of Business Administration of St Clements University and Irish Business School in which student took to get exemptions from AIA became a competitor to the Defendant's Commerce Department which was promoting its students to sit for the ACCA examination ....
>
> From the above it cannot be disputed that the dominant motive of the Defendant in putting this note to the LAN circular and its own letter dated 21 April 2000 and circulating to its students was made with the intention of discrediting the two (2) universities promoted by the plaintiff. This is express malice.

[192] From the above passage, clearly the learned trial judge seems to have a penchant for all things hearsay, speculative and conjectural; for, where is the evidence of any of the dastardly motive attributed to the defendant?

[193] There is no evidence adduced by the plaintiff to show for instance, that the college syllabus or curriculum which shows the changes made in the accounting department, rendering this new program in competition with the defendant's program. There is no evidence by the plaintiff for example that this change had indeed taken place and approved in a meeting of the board. There is no minutes of such meeting for instance. Neither is there any evidence adduced that the defendant had felt threatened by the competition — through its conduct or its action. Nothing of that sort happened or was adduced as evidence.

[194] In the absence of all material facts to prove this allegation, the learned trial judge's finding is irrelevant. He has clearly misdirected himself. In the stark absence of conclusive evidence that each and every ingredient of the plaintiff's claim had been proven, it is surely a misdirection on the learned trial judge's part to make erroneous findings of fact leading to misdirection in law.

[195] Arising from this, the learned trial judge shifted the burden on to the defendant. Naturally the judge focused his mind on the defences put up by the defendant.

[196] I should not now concern myself with the defences since I had found that the plaintiff had failed in his claim. The burden of proof had not shifted to the defendant. A

[197] However I believe that for good measure, there is much to be said for putting the whole matter in perspective. Thus let us consider the facts. B

[198] The defendant put up two grounds of defence ie the defence of justification and fair comment. First of all, it is true that a staff of the defendant put up the note in P20. But he said that at the time of putting that note, he had obtained an oral confirmation from British Council of this fact (that St Clements University was under Irish Business School). It was later, in the course of an investigation that he found out that this fact is not correct. But at the time the note was put up be believed it to be true. The defendant was not challenged on this point. C D

[199] The learned trial judge cited several authorities such as *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408, HC, and *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66, FC which said that justification is a complete defence to libel if the defamatory imputation is true or that the material statements in the libel are true. E

[200] It is banal to state that it is the question of imputation that is material in this case. Imputation here refers to the truth of the statement alleged to be defamatory not to the identity of the person said to have made the statement. F

[201] The question one might ask is: Is the statement of the defence that the existence, legality and academic quality of St Clements University and Irish Business School are in doubt, in fact and in substance, true? G

[202] The learned trial judge took a narrow approach. He said that in order to succeed on their plea of justification, the defendant must prove that their statement on the note to the LAN circular and para 1 and 2 of P23 are true. He said that the truth that must be proven by the defendant is that the LAN circular dated 20 August 1999 (P20) states that St Clements University and Irish Business School's legality, existence and academic quality are in doubt. H I

[203] The learned trial judge had clearly missed the point. It is important to distinguish what the law requires to be proven and what the learned trial judge believes should be proven.

[204] Firstly it is true that LAN did not, either in P20 or in P23, question the validity, existence and academic quality of the two institutions.

[205] But it is true and is a fact that the validity, existence and academic quality of the two institutions are in doubt.

[206] The truth of the defendant's imputation above is manifest in the testimony of defendant's witnesses.

[207] The first direct evidence came from Puan Zainun bt Ahmad (DW3), a senior corporate manager of LAN. She testified that LAN is responsible for evaluating and assessing the quality control of private higher educational institutions in Malaysia and also those of foreign higher educational institutions intending their degrees to be recognised in Malaysia. Puan Zainun testified that:

(i) Both St Clements University and Irish Business School are not recognised institutions of higher learning. She observed that:

> Saya dapati ijazah dari kedua-dua institusi tersebut adalah diragui kerana St Clements University sebenarnya cuma Syarikat di Turks dan Caicos Island dan bukannya sebuah universiti yang sahih.

(ii) Private higher educational intuitions are not allowed to conduct courses 100% on line;

(iii) Private higher educational institutions which intend to conduct courses in Malaysia are required to apply to LAN for course evaluation and obtain prior approval from LAN before being allowed to offer courses.

[208] In this regard, there is no evidence adduced by the plaintiff whether prior approval from LAN was obtained in relation to courses offered by St Clements University and Irish Business School.

[209] The other defence witness was one Gerald John Liston (DW1), Director of the British Council who enjoys diplomatic immunity. He waived it to give evidence on the defendant's behalf. He testified that:

(i) St Clements University and Irish Business School are not listed in the list of educational institutions recognised in the United Kingdom.

(ii) British Council only provided accommodation and invigilation services for any examination that is conducted in Malaysia. It *does not give recognition* to the degree or course, invigilated.

[210] Further evidence of justification/truth was given by Dr Ariff Kassim,

director of Enforcement of the Private Higher Education Department (a Registrar of Private Higher Education's Institution) under s 3(2) of the Private Higher Educational Institution Act 1996 (PHEI Act), who testified that:

(i) The plaintiff had committed offences under the said Act in issuing misleading advertisement with false contents;

(ii) The respondent had committed offences in collecting thousands of ringgit from students and issuing degrees from private institutions which had no permission to conduct any higher private educational course in Malaysia;

(iii) The above act of the plaintiff renders him liable to prosecution under s 75 of the PHEI Act. The PHEI Act regulates the conduct of all individual and institutions which consider themselves private high educational institution in Malaysia including those purporting to provide 'distance' education.

[211] The matter is compounded when the plaintiff's solicitors themselves received a reply on 20 December 2001 from the Embassy of Ireland in response to their letter, stating that:

> I wish to confirm that the Irish Business School is not recognized by the Department of Education and Services of Ireland as an educational body.

[212] Even the Public Services Department (PSD) or (JPA) Malaysia had something to say. According to its letter dated 12 June 2000 addressed to the defendant, the degree offered by St Clements University in:

(a) Bachelor of Accounting;

(b) Bachelor of Business;

(c) Bachelor of Business Administration;

(d) Bachelor of Business Management;

(e) Bachelor of Commerce;

(f) Bachelor of Arts in Professional Studies; and

(g) Bachelor of Computing.

are not recognised by the Government for purposes of appointment to the Civil Service. The recognition by PSD on St Clements University and Irish Business School's post graduate degrees is dependent upon the recognition by PSD, of the basic degree first had and obtained by the holder.

[213] The significance of these witnesses' testimony, was clearly lost on the learned trial judge. The learned trial judge had failed to consider Dr Ariff

Kassim's testimony who testified that in view of the provision of the PHEI Act the plaintiff could be regarded as having issued false information and misleading advertisement. Though this is only an opinion, regard must be had to it, coming as it were from the director himself.

[214] The learned trial judge took an equally simplistic approach as regards the evidence of Puan Zainun DW3. The learned trial judge ignored the significant portion of her evidence but placed emphasis on her inconsequential view that at the time of the LAN circular in 1999, LAN had not even heard of these two institutions and that she only obtained information regarding them after she received a subpoena in 2003 to attend the trial.

[215] This, and the learned trial judge's disregard for the testimony of the Director of the British Council and letter from PSD, meant only one thing — that the learned trial judge had failed to critically evaluate the evidence before him. The fact the plaintiff had failed to produce any evidence at all to establish the existence, legality and academic quality of the two institutions (matters which is specifically within the knowledge of the plaintiff) should have been critically considered by the learned trial judge.

[216] A minor yet significant point not given weight to by the learned trial judge relates to the fact that the plaintiff had asked the defendant to withdraw the impugned words and to apologise to the plaintiff. The defendant had done so. In the face of the said withdrawal and apology by the defendant, the demand for further apologies and sum of RM980,000 by the plaintiff were unjustified and could ironically, be said to be actuated by malice.

[217] In fact, in view of the evidence before me, I find that even though the burden had not shifted to the defendant, the defence of justification would easily come to roost. On the totality of evidence, my view is that the absence of academic quality of both St Clements University and Irish Business School is established. Their validity and existence are clearly in doubt.

[218] As for the defence of fair comment, it must be said at the outset that generally, to qualify, the defendant must establish that:

(i) the statement must be comment and not fact;

(ii) the comment must have a sufficient factual basis (ie the comment must be based on facts which are themselves sufficiently true);

(iii) the comment must be one which an honest person could hold. This is an objective test, but should not be confused with reasonableness; and

(iv) the subject matter of the comment must be of public interest.

[219] The defendant must prove all four tests and if successful, there is nothing more for him to do, unless the plaintiff proves that the comment was maliciously published. In this sense, malice means that the defendant did not honestly believe in the opinion he was expressing. If the defendant honestly believes the opinion, an improper motive for publishing a defamatory opinion will not amount to malice.

[220] The defendant made his comment in the note in P20 and in P23. It is undisputed that the defendant had been orally informed by British Council of the fact that St Clements University was under Irish Business. The plaintiff did not at any time challenged this part of the defendant's testimony. It was only later, when the defendant was informed otherwise that the defendant admitted that that fact was untrue.

[221] But what is crucial is at the time of his comment he honestly believes it to be true. The plaintiff in this connection failed to establish that the defendant was actuated by malice when he made the said comment.

[222] Case laws have indicated that the subject matter of the comment must be a matter of legitimate public interest. In *London Artists Ltd v Littler* [1969] 2 QB 375, Lord Denning observed that:

> Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at what is going on or what may happen to them or others: then it is a matter of public interest on which everyone is entitled to make fair comment.

[223] The defendant honestly believed that as the principal of Southern College he would be failing in his duty if he were to ignore the risk students might fall into if he did not warn them. The defendant felt he owed a duty to protect students from any dubious representation.

[224] In fact his worst fears were realised when the evidence of PW1, DW3, DW1, the officer for Irish Embassy and officer from PSD provided disquieting evidence on the actual position and standing of the two institutions. The defendant had reason to believe that the legality, existence and academic quality of the two institutions were in doubt. As had been shown and not rebutted by the plaintiff, the circular itself (P23) indicated that the defendant had received a complaint from a parent regarding the marketing of degree program from the two institutions. So where is the malice as alluded to by the plaintiff?

[225] As observed in a textbook, *Libel and Slander* by Carter-Ruck (4th Ed p 131):

A No action will succeed without proof of express malice in respect of a statement made by a person in the performance of a legal, moral or social duty to a person who has a corresponding interest in receiving such statement.

B **[226]** In view of the true facts about the two institutions which were admitted during trial there is no doubt that the students and lecturers to whom the note in P20 and Circular (P23) were directed to had a corresponding interest to be alerted that the legality, existence and academic quality of 'St Clements University UK' and 'Irish Business School' are in doubt.
C

[227] It might be argued by the plaintiff that the impugned words in P20 and P23 are defamatory of him, since even if the defendant were successful in proving his defence of justification the truth of the statement came about
D only *after* the allegation were made.

[228] However it must not be lost sight of that the purpose of the civil laws is to compensate a claimant, not to punish a defendant. Thus if a malicious defendant who publishes allegations believing them to be wholly false, solely
E with the intention of injuring the claimant, will successfully defend that claim if it emerges that he has accidentally stumbled upon the truth (see p 55 *Defamation Law, Procedures and Practice* (3rd Ed) by David Price and Korieh Duodu). And even if the statement is untrue at the date of publication, subsequent misconduct of the claimant before the claim is tried may be relied
F on by the defendant to prove the truth of the publication (*Cohen v Daily Telegraph Ltd* [1968] 1 WLR 916).

[229] So is the position in this appeal. Much as the defendant argues that he need not put up any defences at all, be it justification or fair comment
G since the plaintiff had not discharged its own burden, the defendant will still be able to secure judgment in his favour since he is able to show that the publication is 'substantially' true or as it was put by Burrough J in *Edwards v Bell* (1824) 1 Bing 403 'as much must be justified as meets the sting of the charge'.
H

[230] Where there are errors in the publication the question of whether the substance or the sting has been proved is a question of judgment which will depend on the fact of the case. Where the errors are minor or technical, they
I will be disregarded for otherwise the plaintiff would be vindicated on an entirely minor basis.

[231] Our s 8 of the Defamation Act 1957 provides for the defence of justification. Section 8 read:

In an action for libel or slander in respect of words containing two or more distinct charges against the Plaintiff a defence of justification shall not fall by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the Plaintiff's reputation having regard to the truth of the remaining charges.

[232] In other words a purposive approach is taken in interpreting s 8 — when for a defence of justification to be upheld, it is not necessary to prove the truth of every word in the statement said to be defamatory. What is relevant is actually the truth of the imputation of the overall statement. It follows therefore that the identity of the maker of the statement is immaterial to the defence of justification. This is the correct interpretation because if the statement were in substance and in fact false, it would still be defamatory even if LAN did make a false statement and was repeated by the defendant. Thus the issue is not whether LAN did make the statement but whether in substance and in fact the imputation of the statement were true.

[233] Clearly the totality of evidence points to the defendant having proven justification and truth of the sting of the impugned words in P20 and P23.

[234] For having concluded otherwise, the learned trial judge had obviously failed to critically evaluate the evidence before him and consequently he made wrong findings of fact leading to a misdirection.

[235] In the light of the above, I find that the learned trial judge had erred in awarding the plaintiff the sum of RM980,000 as special damages, when the plaintiff had led no evidence on special damages. The rule is explicit.

[236] Special damages must be pleaded or proved. Merely pleading special damages without more is unacceptable. Thus the award of special damages of RM980,000 must fail. As for awarding the plaintiff the amount of RM50,000 for aggravated damages the learned trial judge had grossly erred in not appreciating the evidence where the defendant had expressly apologised within seven (7) days as requested by the plaintiff. Thus this head of damages should also fail.

[237] The learned trial judge also erred in assessing general damages. This he did by computing the loss of income in 1998 and the drop in income at a later date, when there was no evidence to substantiate this. In any case, loss of income is special damages, not general damages (for which the learned judge had already awarded RM980,000 separately).

[238] In the circumstances I find that the error committed in the court

below justifies appellate intervention. Thus I would allow this appeal with costs here and below and the High Court decision is set aside. Deposit to be refunded to the defendant.

Vincent Ng JCA:

[239] After having read the grounds of judgment of my learned brother, James Foong Cheng Yuen JCA and the views in brief of my learned sister Zainun Ali JCA, I wish to now state my considered views in the following manner.

[240] On the question of liability I fully agree with my brother James Fong that the appeal should be dismissed. In my view the whole crux of the divergent views of my brother and sister boils down to the question of onus and the pleadings. Surely, in a claim of this nature now before us, the onus rests on the defendants not only to prove each heading of their defences but also to clearly plead the nature of their defences, which in my opinion, they have failed to discharge. The evidential burden of proof is largely founded on the maxim: 'He who alleges must prove'. Furthermore, even in terms of the evidence adduced the testimony of the defence witnesses, in particular, DW4, militated against the cause of the defence. It is indeed trite that fair comment does not cover assertion of facts but only comments or opinions. I find that the impugned words were clearly assertions of facts by the defendants.

[241] On quantum, I agree with my brother James that the sum of RM50,000 awarded by the court below as exemplary and aggravated damages ought not to be disturbed — the letter of apology from the defendants to the plaintiffs clearly does not at all constitute an unqualified apology — and that the sum of RM200,000 for general damages must, in the light of current trends, be reduced to RM100,000. I however agree with my sister Zainon that the plaintiffs had merely pleaded but had failed to lead any credible or satisfactory evidence on the special damages of RM980,000. The paltry evidence adduced had failed to meet the strictness of proof required. I for one would not allow this quantum under this heading of the claim.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed